No. 96. (and 198 of 1897.) 247

Motion to restore &c.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 96.

WILLIAM WHEELER HUBBELL, APPELLANT,

vs.

THE UNITED STATES.

AND

OCTOBER TERM, 1897.

No. 198.

WILLIAM WHEELER HUBBELL *vs.* SAME.

Motion to Restore Case No. 198 of October Term, 1897, to the Docket, and for Leave to Argue Same in Connection with No. 96 of the Present Term.

Now comes Frederic D. McKenney, of counsel for appellant in the above-entitled causes, and moves the court to restore case No. 198 of October term, 1897, now pending

before it on motion for a rehearing, to the docket, to be heard with case No. 96 of the present term as one case.

As ground for such motion, it is respectfully shown that on or about the 19th day of April, A. D. 1883, the appellant, Hubbell, filed his petition in the Court of Claims of the United States against the appellee to recover on an implied contract for the manufacture and use of certain cartridges, the specific form of which was claimed and alleged to be covered by letters patent of the United States theretofore issued to him. The case was numbered 13793 on the docket of that court, and is No. 96 of the present term on the docket of this court. It was dismissed by the Court of Claims June 1, 1885.

August 14, 1885, claimant filed a motion for a new trial and an amendment of the Findings of Fact entered therein, which, on December 14, 1885, was overruled as to the first branch and granted in a modified form as to the second (Rec. No. 96, p. 31). Pending action on such motion, on August 21, 1885, claimant filed an appeal to this court, subject to the then pending motion, and the same stood without action of allowance (p. 32) until June 7, 1898, when it was allowed in open court (p. 30).

Pursuant to the order of December 14, 1885 (*supra*), claimant, on October 8, 1886, filed a request for further findings of fact in said case, and while this request was pending before the court undisposed of he, on the 11th day of June, 1888, filed a further petition in the Court of Claims upon one branch of the same subject-matter contained in the former suit, but covering a subsequent period of time, which petition was docketed as No. 16261 on the docket of that court, and subsequently became No. 198 of October term, 1897, in this court.

Thereafter, on November 12, 1891, the claimant filed in case No. 13793 the following motion, which was allowed by the court:

WILLIAM WHEELER HUBBELL
vs.
THE UNITED STATES.
No. 13793.

The claimant moves the court to amend the order in this case substantially as follows, to wit: That on the hearing of the motions pending under the order of the court for an amendment of the findings and reversal of judgment—

The claimant may read in evidence the replies of the War Department and claimant's depositions taken in case 16261, between the same parties, in relation to the "reloading cartridge," so called, and the defendant may read any new matter taken in case 16261.

It being understood here in open court that the claimant waives all claim in suit 13793 and suit 16261 on the "cup-anvil cartridge," as not coming within the combination claim of his patent, though originally, in 1842, invented by him; but claimant retains his claim in suit 13793 and suit 16261 on the "reloading cartridge" as made and adopted by the defendant since "July, 1879," as embraced by the claim of his patent No. 212,313, dated February 18, 1879.

Subsequently the claimant, the Assistant Attorney of the Department of Justice in charge of the defense in both cases assenting thereto, filed the following motion, WHICH WAS ENTITLED IN BOTH CASES, and was "allowed" by the court:

WILLIAM WHEELER HUBBELL
vs.
THE UNITED STATES.
No. 13793 and 16261.

Claimant moves to print the motion filed Nov. 12th, 1891, and allowed, as to cases 13793 and 16261, as therein stated (without the printed matter annexed).

Also to print the order of court on motions for new trial, &c., &c., in 13793, referred to by defendant's brief in 16261, but not printed, filed Dec. 14, 1885.

Also to print numbers 5 and 6 as certified by the Patent Office and stipulated in schedule of June 3, 1884, allowed by Chief Justice Drake, but not printed as certified (excepting the drawings, which are printed).

GEO. S. BOUTWELL, *Att'y*,
By WM. W. HUBBELL, *Cl't.*

I assent to the above, provided the text of Nos. 5 and 6 are printed in full, with proper explanatory notes or marks to indicate the various changes made in the specifications and claims while the matter was before the examiners in the Patent Office.

CHARLES C. BINNEY,
Ass't Att'y.

(Endorsed:) 13793 & 16261. Court of Claims. Wm. Wheeler Hubbell *vs.* The United States. Motion of claimant to print Nos. 5 & 6 of the record as certified and the orders of court & motion allowed. Allowed, with Mr. Binney's addition. W. A. R., Ch. J.

December 23, 1895, it was ordered by the Court of Claims, upon the facts then found, that the petition in No. 16261 be dismissed, and thereafter, on February 3, 1896, the claimant, by his attorney of record, Mr. Boutwell, filed the following motion, which was entitled in both cases and allowed by the court:

WILLIAM WHEELER HUBBELL
vs.
THE UNITED STATES. } No. 13793, No. 16261.

Motion to hear argument of motions for new trial and amendment of findings of fact in the above-stated cases at the same time.

And now comes the claimant, by his attorney, and moves the court that the motions for new trial in 16261 and amendment of findings of fact in 13793 and 16261 be heard at the same time.

GEO. S. BOUTWELL,
Attorney for Claimant.

F. P. DEWEES,
Of Counsel.

Endorsed: 13793 & 16261. W. W. Hubbell *vs.* The United States. Motion that the motion for new trial in 16261 and for amended findings of fact in both cases be ar-

gued at the same time. Allowed. W. A. R., Ch. J. Filed Feb. 3, 1896. Court of Claims. F. P. Dewees, of counsel. Geo. S. Boutwell, att'y for claimant.

Pursuant to this last motion, the Court of Claims made additional findings of fact, both on behalf of the plaintiff and on behalf of the defendant, and directed the same to be filed in case No. 16261, the result of such action being to include within the record in that case all findings of fact which were applicable to both cases, thus in effect combining the two cases for the purposes of an appeal and presenting in a single record each and every question which could have been raised in this court upon appeal in either case.

The practical effect of the court's action in this regard was to treat case No. 16261 as an amendment of or addition to case No. 13793, and it is apparent from the action of the court taken on the motion last above set forth that the court did not consider its judgment in case No. 13793, which must have been specifically brought to its attention in course of considering the matters growing out of that motion, as operating to render the controversy in case No. 16261 *res judicata*.

It appears that this court when considering case No. 198 of October term, 1897 (No. 16261), may have been misled, perhaps by the form in which the transcript of the record on appeal was prepared, and concluded therefrom that the prior judgment in case No. 13793, which was being held in abeyance by the Court of Claims pending the disposition of the appeal in the former case, did operate to bar a recovery in the latter suit. Such conclusion, however, has not passed into a final judgment, as a motion for a rehearing, filed May 31, 1898, is still pending before the court undisposed of.

Whatever may have been conceived to be the effect of the judgment of the Court of Claims in case No. 13793, so

long as no appeal therefrom had been perfected, it is of less moment now, since on the 7th day of June, 1898, upon motion for the claimant, the Court of Claims, in open court, entered therein the following order:

WILLIAM WHEELER HUBBELL
vs.
THE UNITED STATES.
No. 13793.

Mr. Dewees, for the claimant, presented an application for the allowance of an appeal filed August 21, 1885, and it was ordered that the appeal be allowed as prayed for.

The defendants filed request for an additional finding of facts, which was allowed.

It seems well settled that an appeal to a superior court, when perfected, vacates the judgment of the court below, and it is unnecessary to suggest that a vacated judgment cannot avail to make good a plea or argument of *res judicata*.

FREDERIC D. MCKENNEY,
Attorney for Appellant.